

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

JAMES SEABA and
CORY PHILLIPS,

03 JUN 10 PM 4:13

Plaintiffs,
v.

Alberto A. León
Civ. No. 02-103 LH/RHS

MESOSYSTEMS TECHNOLOGY, INC.,

Defendant.

**AFFIDAVIT OF ALBERTO A. LEÓN IN SUPPORT OF MESOSYSTEMS'
OPPOSITIONS TO PLAINTIFFS' MOTIONS TO COMPEL**

STATE OF NEW MEXICO)
)
) ss.
COUNTY OF BERNALILLO)

Alberto A. León, being first duly sworn upon oath, states as follows:

1. I am a partner at the law firm of Bauman, Dow, McIntosh and León, P.C.. I am one of the attorneys for MesoSystems Technology, Inc., defendant in this action. I make this declaration upon personal knowledge of which I am competent to testify.
2. I submit this affidavit in support of Defendant's Opposition to Plaintiffs' Motion to Compel Defendant's Discovery Responses and Motion for Protective Order and Defendant's Opposition to Plaintiffs' Motion to Compel Defendant to Conduct a Complete Search of All Electronic Assets for Documents Responsive to Discovery Requests and to Produce Laptop Computer for Inspection.
3. I deposed James Seaba on April 2, 2003. A true and correct copy of relevant excerpts from the transcript for the Seaba Deposition is attached hereto as Exhibit A.

4. I deposed Cory Phillips on April 3, 2003. A true and correct copy of relevant excerpts from the transcript for the Scaba Deposition is attached hereto as Exhibit B

5. On August 13, 2002, in conjunction with producing its responses to Scaba's First Request for Production, I provided to Plaintiffs' counsel a proposed stipulated protective order.

6. After providing Plaintiff with its proposed protective order on August 13, 2002, MesoSystems did not receive any feedback on the protective order until April 2003. Instead, on September 6, 2002, Phillips issued a set of requests for production prior to responding to MesoSystems' offer to enter into a stipulated protective order.

7. MesoSystems responded to Phillips' First Requests for Production on October 22, 2002. The parties specifically agreed to a fifteen-day extension (from October 7, 2002 to October 22, 2002).

8. It was not until the first week of April 2003, during the deposition of Ned Godshall where MesoSystems' counsel objected to questioning that would reveal confidential, financial or trade secret information for either MesoSystems or MesoFuel, that Plaintiff acknowledged the proposed protective order. A true and correct copy of relevant excerpts from the Godshall Deposition is attached hereto as Exhibit C.

9. MesoSystems is submitting herewith as Exhibit D an amended privilege log that reflects the privileged document received from a private investigator that is being withheld on the basis of the work-product doctrine.

10. Attached as Exhibit E is a true and correct copy of relevant excerpts from Deposition of Samantha League.

11. To date, Plaintiffs have failed to reimburse MesoSystems with the expenses (over \$700) incurred in providing mirror image copies of the hard drives from the laptops used by Plaintiffs during their employment. MesoSystems, in good faith, provided these mirror images to Plaintiffs in order to allow Plaintiffs the opportunity to

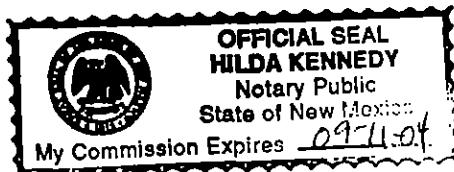
conduct their own examination of the data contained on the laptops so that Plaintiffs could adequately respond to MesoSystems' pending Motion for Sanctions. However, Plaintiffs have yet to pay for these mirror images.

Alberto A. León

SUBSCRIBED and SWORN to before me this 10th day of June, 2003.

Hilda Kennedy

Print Name: HILDA RENNEDY
Notary Public in and for the State of New
Mexico, residing at Albuquerque
My commission expires: 09-11-04



I HEREBY CERTIFY that a true
And correct copy of the foregoing
was mailed to counsel of record
this 10th day of June, 2003.

Alberto A. León

1 IN THE UNITED STATES DISTRICT COURT
 2 FOR THE DISTRICT OF NEW MEXICO
 3 Civ. No. 02-103 LH/WWD

4 JAMES SEABA and
 5 CORY PHILLIPS,

6 Plaintiffs,

7 vs.

8 MESOSYSTEMS TECHNOLOGY, INC.,

9 Defendant.

COPY

12 DEPOSITION OF JAMES SEABA, Ph.D.

13 April 2nd, 2003

9:12 a.m.

14 7309 Indian School Road, Northwest
 15 Albuquerque, New Mexico 87110

17 PURSUANT TO THE FEDERAL RULES OF CIVIL
 18 PROCEDURE, this deposition was:

20 TAKEN BY: MR. ALBERTO A. LEON
 21 ATTORNEY FOR DEFENDANT

23 REPORTED BY: MICHELE TRUJILLO, CCR No. 226
 24 Kathy Townsend Court Reporters
 25 110 Twelfth Street, Northwest
 Albuquerque, New Mexico 87102

1 A P P E A R A N C E S

2 For the Plaintiffs:

3 MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.
 4 Attorneys at Law
 5 500 Fourth Street, Northwest, Suite 600
 Albuquerque, New Mexico 87102
 By: MS. LISA MANN

6 For the Defendant:

7 BAUMAN, DOW, MCINTOSH & LEON, P.C.
 8 Attorneys at Law
 9 7309 Indian School Road, Northwest
 Albuquerque, New Mexico 87110
 By: MR. ALBERTO A. LEON
 MR. CHRIS BAUMAN

10 Also Present:

11 Dr. Ned Godshall
 Dr. Cory Phillips.

14 I N D E X

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EXHIBIT

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1 EXHIBITS

2 SEABA EXHIBIT: MARKED

3 1. Complaint for Damages Injunctive and
 4 Declaratory Relief 38

5 2. First Amended Complaint for Damages,
 6 Injunctive and Declaratory Relief 19

7 3. Resume: James Philip Seaba, Ph.D. 36

8 4. Plaintiff James Seaba's Answers to
 9 Defendant's First Set of Interrogatories,
 10 Requests for Production of Documents and
 11 Requests for Admission 40

12 5. E-mail dated 11/7/01 to Lubeck, Cali and
 13 Schallop from Mr. Seaba 65

14 6. Agenda for June 9th and 10th, 2001 85

15 7. Document titled "MicroReactors Applied
 16 to Clean Energy," Dr. James Seaba, 5/26/01 96

17 8. Offer of Employment with MesoSystems
 18 Technology, Inc., to Dr. Seaba dated 8/2/01 106

19 9. Confidential Information, Inventions and
 20 Noncompetition Agreement 115

21 10. Articles of Incorporation for Red Path
 22 Energy 119

23 11. Profit Corporate Report for Red Path Energy 136

1 MS. MANN: Before we start, I see that
 2 Mr. Godshall is here today. Is he here as the corporate
 3 representative for MesoSystems?

4 MR. LEON: That is correct.

5 MS. MANN: I would like that on the record,
 6 please.

7 JAMES SEABA, Ph.D.

8 after having been first duly sworn under oath,
 9 was questioned and testified as follows:

10 DIRECT EXAMINATION

11 BY MR. LEON:

12 Q. Can you state your name, please?

13 A. James Seaba.

14 Q. Have you ever been deposed before?

15 A. Yes, once before.

16 Q. When?

17 A. About 20 years ago.

18 Q. Can you tell me in connection with what you
 19 were deposed?

20 A. I witnessed a murder.

21 Q. Is that the only time?

22 A. Yes.

23 Q. Where was that?

24 A. It was Iowa City, Iowa.

25 Q. Who deposed you then?

	117	119
1	MS. MANN: Exhibit 9?	1 Q. When did that happen?
2	(Ms. Mann confers with the witness.)	2 A. I believe the incorporation took place in the
3	A. I thought this was the -- I'm sorry. I read --	3 first week in December
4	so, I'm sorry, you meant the entire agreement?	4 Q. What was the purpose of incorporating this
5	Q. Yes, sir.	5 company?
6	A. That I'm bound about the entire agreement?	6 A. To get a company name to set up accounts, bank
7	Q. Uh-huh.	7 accounts, and obtain federal ID numbers and start that
8	A. Today?	8 process.
9	Q. Yes. I understood that was your counsel's	9 Q. Are you talking about doing all of these things
10	<i>concern and your concern about maintaining this as</i>	10 for NewCo, the same new company that was going to be done
11	confidential, that you were bound by a confidentiality	11 with MesoSystems, or are we talking about a separate
12	agreement with MesoSystems, and I didn't want to be	12 company?
13	accused of breaching it by disclosing information in this	13 A. No, with NewCo.
14	deposition.	14 Q. I'm going to hand you what the court reporter
15	A. Right.	15 is going to mark as Exhibit Number 10, and I'm going to
16	Q. So my question is: Do you consider yourself	16 ask you to identify that.
17	bound by this agreement today?	17 (Seaba Exhibit 10 marked.)
18	A. Again, I'm not a lawyer, so it's difficult for	18 Q. I'm sorry. I handed you the wrong one. I gave
19	me to ascertain.	19 you MesoFuel, didn't I? Yeah, I meant to give you Red
20	It's my current understanding that I'm not	20 Path Energy, which I'll get during the break. We'll
21	bound by the entire agreement.	21 leave it marked, but we'll refer to it later on, because
22	Q. Why is that?	22 I'm going to use this one.
23	A. Because the noncompete is no longer valid.	23 MR. BAUMAN: I'll get it.
24	Q. When did, as far as you understand, the	24 MR. LEON: Yeah, could you get those for me,
25	noncompete part of the agreement expire?	25 please?
	118	120
1	A. I believe my understanding is December 7th,	1 MS. MANN: I could use a restroom break.
2	2002.	2 MR. LEON: All right. Let's take a restroom
3	Q. Is it your testimony, though, that you are	3 break.
4	bound by part of this agreement?	4 (Recess taken.)
5	A. That's unclear.	5 Q. I would like you to examine what has been
6	Q. Well, you said that you were partly bound by it	6 marked as Exhibit 10 to this deposition, and I'm going to
7	or that you were bound in part. I'm trying to ascertain	7 ask you a few questions about it.
8	what part of this agreement, what aspect of this	8 Do you recognize that document? I think
9	agreement, what conduct are you still bound to, you know,	9 there's several documents in one.
10	to do or not to do, based on your understanding of this	10 A. Yes.
11	agreement, without going into any legal conclusions or	11 Q. Can you tell me what these documents are?
12	anything like that?	12 A. Just as they state, Public Regulation
13	A. My understanding is that I'm still bound by	13 Commission, but it's -- the purpose is to incorporate Red
14	confidentiality.	14 Path Energy.
15	Q. So based on that, let me ask you a couple of	15 Q. Before we broke, you testified that this
16	questions, then. Since your employment with MesoSystems	16 incorporation was done in connection with NewCo, what
17	ceased, have you disclosed any confidential information	17 we've been calling NewCo yesterday and today?
18	of MesoSystems to anybody else?	18 A. Correct.
19	A. I believe that to be true.	19 Q. Who did this incorporation work for you?
20	Q. You have? You have disclosed or you have not	20 A. Clinton Marrs.
21	disclosed information?	21 Q. Who is Clinton Marrs?
22	A. I believe I have not disclosed any information.	22 A. An attorney in Albuquerque.
23	Q. Were you involved in the incorporation of a New	23 Q. Is he a MesoSystems attorney?
24	Mexico company called Red Path Energy, Inc.?	24 A. No.
25	A. Yes, I was.	25 Q. Was he your individual attorney?

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1	A. He, Clinton Marrs, represented Cory and I.	1	A. Correct.
2	Q. Did MesoSystems – are you aware whether	2	Q. Is this why he wasn't listed here as a director
3	MesoSystems at the time that this was incorporated –	3	in the articles of incorporation that we're looking at?
4	whether MesoSystems had any attorneys working for them?	4	A. No.
5	Only if you're aware. I mean, if you're not aware,	5	Q. What is the reason why Dr. Call wasn't listed?
6	that's fine.	6	A. This was just the articles of incorporation..
7	A. I don't recall, no.	7	To help clarify --
8	Q. I was just wondering why MesoSystems' attorneys	8	Q. Go ahead.
9	didn't prepare these documents. Do you know why, if this	9	A. -- just as Ned discussed yesterday, when
10	was for NewCo?	10	MesoFuel was incorporated, you had the CFO for four days,
11	A. I wasn't aware of MesoSystems' attorneys, and I	11	and then, when you get all of the articles and other
12	was basically in charge of Red Path Energy.	12	things done, the real structure is formed.
13	Q. On the third page of this document, there is a	13	Q. Was Dr. Call aware that you were filing these
14	stamp on top of it that gives a date of filing. Can you	14	articles of incorporation on December 3rd or around that
15	tell me what date that is?	15	time?
16	A. December 3rd.	16	A. No.
17	Q. How many days before you allege you were fired	17	Q. If this was going to be NewCo, why didn't you
18	did this incorporation take place?	18	inform him that you were forming this company?
19	A. Could you restate that question?	19	A. It didn't seem important.
20	Q. Your allegation in this case is that you were	20	Q. The incorporation of the company that was going
21	fired by MesoSystems, correct?	21	to be the spin-off of MesoSystems wouldn't be important
22	A. Correct.	22	to Dr. Call; is that your testimony?
23	Q. What was the date of firing, according to your	23	A. No. I didn't state that.
24	allegations?	24	Q. Tell me what wasn't important, then, because I
25	A. December 6th.	25	truly don't understand it, so help me, please.
	122		124
1	Q. So this would have been filed three days before	1	A. In my own words, Dr. Call provided a separation
2	the alleged firing, correct?	2	agreement, in that stating -- forming an independent
3	A. Correct.	3	company. We talked about money coming in. So my
4	Q. Does the name of anybody related to MesoSystems	4	concern, and maybe it was an incorrect concern --
5	at this time, besides you and Dr. Phillips, appear in any	5	incorrect, but my thought was we simply needed to
6	of these documents?	6	incorporate to get all of the paperwork in motion to get
7	A. No.	7	it set up so that we would be able to apply for
8	Q. Is Dr. Call named as a director of Red Path	8	government contracts, which were coming up in January and
9	Energy under these articles of incorporation, according	9	February.
10	to your understanding?	10	So I was concerned about the time line, and I
11	A. Well, Dr. Call was not listed as a director at	11	thought this was the logical first step in working on
12	this time.	12	that separation agreement.
13	Q. Those fluid negotiations that we talked about	13	Q. During this time frame of early December 2001,
14	before that took place over the fall of 2001, at any time	14	were you at any point contemplating leaving MesoSystems?
15	was it contemplated that Dr. Call wasn't going to be a	15	A. In December?
16	director of NewCo?	16	Q. Yes.
17	A. Was not going to be a director?	17	A. No.
18	Q. I can phrase that affirmatively. Is it fair to	18	Q. Do you remember having any discussions with
19	assume or is it fair to say that, at all times during	19	Dr. Call or anybody else at MesoSystems about the
20	these negotiations, Dr. Call was going to be a director	20	formation of Red Path Energy on December 3rd?
21	of NewCo?	21	A. I don't recall talking about the incorporation
22	A. I believe that was to be determined.	22	with anyone.
23	Q. So at some point during these negotiations,	23	Q. Let me point you cut to Article III of the
24	there was a contemplation that Dr. Call was not going to	24	articles, paragraph three of the articles of
25	be a director of NewCo?	25	incorporation, which I think is the third paragraph of

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1 the exhibit.	1 approached.
2 Subparagraph A, can you read that out loud for 3 the record?	2 Q. Just the ones that you remember is fine.
4 A. Article III?	3 A. Well, first, we went to TVC not for funding, 4 but to help us with the company. That's the purpose of 5 TVC in Albuquerque.
6 Q. Yes. Article III, subpart (a). Well, actually 7 just read Article III.	6 Then we approached -- ch, mar, I'm trying to 7 think here. Just a moment.
8 A. "The corporation is formed for the following 9 purposes: To engage in research and development of micro 10 reaction technology and other technologies, new products 11 pertaining thereto and new product applications: and to 12 engage in any lawful act or activity for which 13 corporations may be organized under this" -- "under the 14 Act."	8 Q. How about Jarrett Carson? Did you approach 9 Mr. Carson?
15 Q. Is it your testimony today that subparagraph 16 (a) defines the purpose of NewCo?	10 A. After December 7th. I called Jarrett Carson.
17 A. Yeah, that would be correct.	11 Q. How did you first get acquainted with
18 Q. On those activities that are defined there in 19 subparagraph III(a), it was your intention to undertake 20 those activities with MesoSystems Technology at that 21 time?	12 Mr. Carson?
22 A. MesoSystems Technology was going to be the 23 major investor in the company.	13 A. I met him at a fuel cell conference.
24 Q. In Red Path Energy, Inc.?	14 Q. When was that?
25 A. Correct.	15 A. Summer of 2001.
Q. So it was never your intention to undertake the	16 Q. Did MesoSystems, Dr. Call or anybody related to 17 them have anything to do with you meeting Mr. Carson?
126	128
activities defined in Article III in competition with MesoSystems or with NewCo?	1 A. Yes.
A. It was never the intention of Red Path Energy to compete with MesoSystems	2 Q. Do you recall who received copies of that 3 business plan?
Q. So what happened to Red Path Energy, Inc., after December 6th, 2001?	4 A. Well, TVC helped, so they had a copy of the 5 business plan, and from what I -- I believe my 6 understanding was, if other potential investors 7 approached them, you know, they could also show that to 8 them.
A. After December 6th, we tried to continue with Red Path Energy, unfortunately, without the support of MesoSystems.	9 Who else?
Q. Where was the intellectual property to be used in connection with Red Path Energy? Where was that going to come from after December 6th, 2001?	10 Q. Let's go back to the investors. I don't think 11 that I ever closed the loop on that. Besides Jarrett 12 Carson, who else did you approach for funding for Red 13 Path Energy after December 7th, 2001?
A. Well, we'd have to make our own intellectual property.	14 A. George somebody. George -- I forgot his name 15 now. He's a local VC here in -- or angel, I should say, 16 here in town.
Q. How would Red Path Energy be funded after December 6th, 2001?	17 Q. How about PNM?
A. That's a good question.	18 A. PNM.
Red Path Energy was then required to look at VCs or angels or -- people, basically, look for money.	19 I don't recall, myself, approaching PNM.
Q. Did you approach anybody in particular, trying to obtain funding for Red Path Energy, after December 6th, 2001?	20 Q. Do you know if anybody on behalf of Red Path 21 Energy approached PNM?
A. Yes.	22 A. It's possible Cory may have.
Q. Can you tell me who and when?	23 Q. How about Wally Hunter?
A. I can't remember all of the people we	24 A. I don't recall approaching Wally Hunter.
	25 Q. How about N plus H Power?

<p>1 A. Nth power?</p> <p>2 Q. Yeah, Nth Power. I'm sorry. N plus H, that's</p> <p>3 nice. I'm sorry. Nth Power.</p> <p>4 A. Yeah, I don't recall approaching Nth Power.</p> <p>5 Q. Did you hold any discussions about Red Path</p> <p>6 Energy with George Richmond after December 7th, 2001?</p> <p>7 A. That was the George somebody. Thanks.</p> <p>8 Q. Can you tell me about that? When did you speak</p> <p>9 with George?</p> <p>10 A. Well, it either had to be the end of December</p> <p>11 or early January.</p> <p>12 Q. Tell me about that discussion. How many</p> <p>13 discussions did you guys have?</p> <p>14 A. Well, I think we talked once on the phone to</p> <p>15 meet at a restaurant, and then we talked at the</p> <p>16 restaurant, and possibly one more time after that.</p> <p>17 Q. Can you give me the substance of the</p> <p>18 discussions? What did you guys talk about?</p> <p>19 A. Well, we talked a little bit, and he was -- in</p> <p>20 my memory, basically, he stated that -- the gist of it,</p> <p>21 he wasn't going to invest in my company, but he was, of</p> <p>22 course, interested, but you always get that.</p> <p>23 Q. Do you know if Mr. Richmond received a copy of</p> <p>24 the Red Path Energy business plan that you guys put</p> <p>25 together?</p>	129	<p>1 computer, or did you do it on a separate computer?</p> <p>2 A. A separate computer? I have to think.</p> <p>3 It was a separate computer.</p> <p>4 Q. Which computer would that be?</p> <p>5 A. I believe it was on my personal laptop.</p> <p>6 Q. Not the one that MesoSystems gave you?</p> <p>7 A. Correct.</p> <p>8 Q. Did you develop -- and, again, you know, we're</p> <p>9 under a confidentiality agreement here, so did you</p> <p>10 develop any intellectual property in connection with Red</p> <p>11 Path Energy after December 7th, 2001?</p> <p>12 A. No.</p> <p>13 Q. Did you attend any conferences or give any</p> <p>14 papers in connection with any work or, you know, anything</p> <p>15 that had to do with Red Path Energy, Inc., after December</p> <p>16 7th, 2001?</p> <p>17 MS. MANN: Are you asking about on behalf of</p> <p>18 Red Path Energy or --</p> <p>19 MR. LEON: Yeah.</p> <p>20 MS. MANN: Because "to do with" is kind of --</p> <p>21 MR. LEON: Yeah, I'm going to ask him did you</p> <p>22 on behalf Red Path Energy first, and then I'm going to</p> <p>23 ask him on behalf of anyone else.</p> <p>24 Q. Let's start with on behalf of Red Path Energy.</p> <p>25 A. I don't believe I ever made any presentations.</p>	131
<p>1 A. He may have, but I can't be certain.</p> <p>2 Q. Let me ask you, and I would like counsel to</p> <p>3 maybe look into this.</p> <p>4 MR. LEON: In response to a request for</p> <p>5 production, number 14, which is one of the exhibits</p> <p>6 marked in this deposition, we requested specifically all</p> <p>7 business plans pertaining to Red Path, and I'm not aware</p> <p>8 that we got a copy of this Red Path business plan that</p> <p>9 was done after December 7th, so can we look into that?</p> <p>10 MS. MANN: Sure. Request number 14?</p> <p>11 MR. LEON: Number 14, yes, page 18.</p> <p>12 MS. MANN: I will look into it.</p> <p>13 Q. So without having the benefit of -- let me ask</p> <p>14 you a couple of questions. Was this Red Path business</p> <p>15 plan in any way similar or based upon the MesoFuel</p> <p>16 business plan that you had done with MesoSystems?</p> <p>17 A. The technology would be different.</p> <p>18 Q. How about the format?</p> <p>19 A. The format?</p> <p>20 Q. Yes, the sections, the content. I mean, you</p> <p>21 know, since I don't have it, I really can't talk about</p> <p>22 it. I'm trying to see if you recollect something.</p> <p>23 A. No, it -- I reformatted and redid the business</p> <p>24 plan from what we had at MesoFuel, or NewCo.</p> <p>25 Q. Did you do that on your MesoSystems laptop</p>	130	<p>1 Q. How about attending conferences on behalf of</p> <p>2 Red Path Energy after December 7th, 2001?</p> <p>3 A. No, I don't believe so.</p> <p>4 Q. Can you tell me what conferences at all you</p> <p>5 have attended since December 7th, 2001, up to, let's say</p> <p>6 -- when did you start your present employment?</p> <p>7 MS. MANN: August of 2002.</p> <p>8 A. August of 2002.</p> <p>9 Q. Between December 7th, 2001, and August of 2002,</p> <p>10 can you tell me all of the conferences that you attended</p> <p>11 during that time?</p> <p>12 A. I attended a DOE conference.</p> <p>13 Q. You attended that as an individual or on behalf</p> <p>14 of any company?</p> <p>15 A. I attended that. I was a private consultant,</p> <p>16 and my client was Phillips Petroleum.</p> <p>17 Q. Any other conference?</p> <p>18 A. Not that I recall.</p> <p>19 Q. During this time, December 2001 to August of</p> <p>20 2002, did you have any jobs? Did you do any work?</p> <p>21 A. Yes, I was a private consultant.</p> <p>22 Q. Did you do these under any kind of corporation</p> <p>23 or entity that you formed, or did you do this as an</p> <p>24 individual?</p> <p>25 A. I did it as a -- I did it under an LLC.</p>	132

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1 Q. When did you first become acquainted with that
 2 company?

3 A. While I was working at Honda.

4 Q. Have you or any company that you've been
 5 affiliated with ever done any strategic alliances or had
 6 any business relationships with Symyx, that you're aware
 7 of?

8 A. I'm sorry. Could you state that again?

9 Q. Are you aware of any company that you've worked
 10 for or you, as a consultant, having any kind of business
 11 relationship with Symyx?

12 MS. MANN: And you've got to watch out, with
 13 your noncompete -- your proprietary information from
 14 Honda.

15 THE WITNESS: Yeah.

16 Q. I'm not asking for the nature of the business
 17 relationship. I'm just asking you if you're aware of any
 18 business relationship.

19 MS. MANN: Start it out just with yes or no.

20 A. Yes.

21 Q. Can you tell me which one of your employers has
 22 ever had a business relationship with Symyx? I don't
 23 want to know the nature. I just want to know --

24 A. No, I cannot.

25 Q. Because of this non- -- this --

1 Oh, I should back up, because I do recall where
 2 we flew out to Symyx to present our business idea,
 3 NewCo's business plan and idea.

4 Q. Who is "we"?

5 A. Dr. Call - Al Schallop met us there -- and
 6 myself.

7 Q. What happened at that -- where is Symyx
 8 located, anyway?

9 A. Santa Clara, California. Silicon Valley.

10 Q. Can you give me a summary, to the best of your
 11 recollection, of what took place during this visit?

12 A. We gave a presentation to one of the persons
 13 there. It was Troy Campione and some other
 14 managers/executives of Symyx. We basically showed them
 15 what we wanted to do, see if they're interested in
 16 investing or partnering or if they wanted to work with us
 17 in some way.

18 Q. Did you or Dr. Phillips, that you're aware of,
 19 have any contacts with Symyx after December 5th, 2001?

20 A. Yes, we've had some contact.

21 Q. Can you tell me about that?

22 A. I have to make it general because of the
 23 confidentiality of Symyx.

24 Q. Go ahead.

25 A. But it was just to explore a business

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1 A. No, it's confidential.

2 Q. Okay.

3 THE WITNESS: But can we talk?

4 MS. MANN: No.

5 Q. Did this take place after you left MesoSystems,
 6 whatever you're referring to that you can't talk about?

7 A. No, it did not take place after I left
 8 MesoSystems.

9 Q. Has there been any activity involving Symyx
 10 since after you left MesoSystems?

11 A. Nothing substantial.

12 Q. So there was no relationship that you're aware
 13 of between Symyx and MesoSystems Technology during the
 14 time that you were there?

15 A. No, that's -- could you restate that question?

16 Q. Are you aware of any relationship, business or
 17 otherwise, between Symyx and MesoSystems Technology that
 18 took place during the time that you were at MesoSystems
 19 Technology?

20 A. Yes, Symyx came to visit MesoSystems, upon my
 21 request.

22 Q. Tell me about that. Tell me about that visit.

23 Who came? When did that take place?

24 A. The exact time was, I think, the end of October
 25 or -- end of October, early November.

1 opportunity at Symyx.

2 Q. Was this business opportunity for Rec Path
 3 Energy, Inc.?

4 A. Correct.

5 Q. Do you remember when this contact or contacts
 6 took place?

7 A. I believe, around the beginning of January
 8 Sometime in January, I believe.

9 Q. Who would be the person at Symyx that you would
 10 have direct contact with?

11 A. Usually, the person that I talk directly with
 12 is Troy Campione.

13 Q. How about a company called Sub Chemi?

14 A. Sud Chemie?

15 Q. Your pronunciation is probably correct. I
 16 murdered that one, but how about them?

17 MS. MANN: They got it.

18 THE WITNESS: Yeah, of course.

19 MS. MANN: How do you spell that one?

20 THE WITNESS: I don't know.

21 MS. MANN: Cory, how do you spell that one?

22 DR. PHILLIPS: S-u-d C-h-e-m-i-e.

23 (Off-the-record discussion.)

24 Q. (By Mr. Leon) Have you had any contact with
 25 them after December 5th, 2001?

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1 A. Sud Chemie.

2 I don't recall a specific discussion or
3 anything, but I think I may have and probably did send an
4 e-mail to the people that we know at Sud Chemie after we
5 had left MesoSystems.

6 Q. How about Porvair?

7 A. I'm not certain if we made any contact with --
8 again, is this in the time after December 5th?

9 Q. After you left, yeah.

10 A. And then do you have another time before then?
11 August, is that --

12 Q. At this point I'm only interested in after
13 December 2001.

14 MS. MANN: Right, but he's asking for a
15 termination point. Are we talking about a time span
16 or --

17 MR. LEON: Anytime, anytime after December
18 2001.

19 A. Okay. Well, I have to back up, then, on Sud
20 Chemie, because I ran into and talked with John Wagner
21 out at the fuel cell meeting in November of 2002.

22 Q. How about Porvair?

23 A. I haven't had any contact with Porvair.

24 Q. Are you aware whether Dr. Phillips had any
25 contact with them?

1 A. Yeah, that is correct.

2 Q. Let's talk about that window of time.

3 A. All right.

4 Q. Can you tell me whether you made any attempts
5 to obtain new employment during this time?

6 A. Attempts to --

7 Q. Send out resumes, call people, headhunters. I
8 mean, I want you to take me through the process that you
9 undertook to obtain new employment during this time that
10 I just referred to.

11 A. Called up some friends.

12 Q. How many friends, and who are these friends?

13 A. I called people at Phillips Petroleum, and I
14 talked to some people at John Deere. I talked to some
15 people at Neuvara.

16 Q. When did these conversations take place,
17 starting with Phillips?

18 A. I believe, in the latter part of January.

19 Q. 2002?

20 A. Yes.

21 Q. Who did you talk to at Phillips in the latter
22 part of January of 2002?

23 A. His name is Joe Kaufman.

24 Q. Did you send out any letters or resumes to
25 Phillips?

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1 A. I can't speak for Dr. Phillips.

2 Q. Well, but are you aware whether he has or not?
3 I'm not asking you to speak for him, but he may have told
4 you or you may have heard or --

5 A. Oh, not that I know of.

6 Q. Just to close a loop on the computer issue,
7 when was the first time that you remember MesoSystems
8 Technology asking you to return the MesoSystems
9 Technology laptop to MesoSystems after December 5th,
10 2001?

11 A. Oh, December 6th, on my voice mail, when he
12 terminated me.

13 Q. Can you tell me why it took almost two months
14 for that to take place? Because the return date, as I
15 understand it, was January 30th, 2002.

16 A. Sure. MesoSystems owed me some money for
17 business travel that they had not paid me; for example,
18 going out to Symyx with Chuck and Al. I still haven't
19 been reimbursed for that; and we had, I think, some other
20 issues with MesoSystems we wanted to resolve, so I think
21 that's why it took so long for the computers to get back.

22 Q. Let's talk a little bit about events that may
23 have taken place after December 5th, 2001, and before --
24 did I understand that you started your new job on July
25 1st, 2002? Is that correct?

1 A. No.

2 Q. How about John Deere? When did you talk to
3 people at John Deere?

4 A. Sometime in February.

5 Q. Who did you talk to at John Deere?

6 A. I can't recall the name right now.

7 Q. Did you send any letters or resumes to John
8 Deere?

9 A. I don't recall.

10 Q. How about Neuvara? When did you talk to people
11 at Neuvara?

12 A. January.

13 Q. Early? Mid? Late?

14 A. Oh, it was, you know, mid- to late January.

15 Q. Did you send letters or resumes to anybody at
16 Neuvara?

17 A. No.

18 Q. Who did you talk to at Neuvara?

19 A. I talked with Jeff Bentley, Bill Mitchell.

20 Q. Any other companies that you talked to during
21 this time?

22 A. Not that I recall.

23 Q. How did you come to get the position that you
24 presently hold? When did you first apply? Who did you
25 talk to? I mean, I just want you to take me through

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF NEW MEXICO
3 Civ. No. 02-103 LH/WWD

4 JAMES SEABA and
5 CORY PHILLIPS,

6 Plaintiffs,

7 vs.

8 MESOSYSTEMS TECHNOLOGY, INC.,

9 Defendant.

COPY

12 DEPOSITION OF CORY PHILLIPS, Ph.D.

13 April 3rd, 2003
14 10:36 a.m.
15 7309 Indian School Road, Northeast
16 Albuquerque, New Mexico 87110

17 PURSUANT TO THE FEDERAL RULES OF CIVIL
18 PROCEDURE, this deposition was:

20 TAKEN BY: MR. ALBERTO A. LEON
21 ATTORNEY FOR DEFENDANT

23 REPORTED BY: MICHELE TRUJILLO, CCR No. 226
24 Kathy Townsend Court Reporters
25 110 Twelfth Street, Northwest
Albuquerque, New Mexico 87102

1 APP E A R A N C E S

2 For the Plaintiffs:

3 MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.
4 Attorneys at Law
5 500 Fourth Street, Northwest, Suite 800
6 Albuquerque, New Mexico 87102
7 By: MR. ANGELO ARTUSO

8 For the Defendant:

9 BAUMAN, DOW, MCINTOSH & LEON, P.C.
10 Attorneys at Law
11 7309 Indian School Road, Northeast
12 Albuquerque, New Mexico 87110
13 By: MR. ALBERTO A. LEON

14 Also Present:

15 Dr. Ned Godshall
16 Dr. James Seaba

17 I N D E X

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15 CORY PHILLIPS, Ph.D.	
16 Direct Examination by Mr. Leon	4
17 CERTIFICATE OF COMPLETION OF DEPOSITION	154
18 SIGNATURE/CORRECTION PAGE	156

EXHIBIT

B

1 EX H I B I T S

3 MARKED

2 PHILLIPS EXHIBIT: 15. E-mail dated 8/22/01 to Dr. Phillips
3 from Dr. Call and e-mail dated 8/22/01
4 from Dr. Phillips to Dr. Call 69
5 16 Offer of Employment for Dr. Phillips
6 dated 5/23/01 105
7 17 Acknowledgment of Receipt document from
8 Modrall Law firm and Chain of Custody Log 109
9 18 Facsimile Cover Sheet dated 3/3/03,
10 letter dated 1/24/02 to Mr. Rohde from
11 Ms. Mann and Exhibit A 109
12 19 Transcript of telephone call from Dr. Call
13 to Dr. Phillips' voice mail 127
14
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4

1 CORY PHILLIPS, Ph.D.

2 after having been first duly sworn under oath,
3 was questioned and testified as follows:

4 DIRECT EXAMINATION

5 BY MR. LEON:

6 Q. Dr. Phillips, good morning. My name is Alberto
7 Leon. I am the attorney for MesoSystems in the pending
8 lawsuit here in federal court. I will be asking you some
9 questions today, as I asked Dr. Seaba in the last couple
10 of days.

11 I'm going to now proceed to make sure that we
12 understand how the proceedings are going to work, and at
13 any time, if you have any questions, will you please ask
14 them of me? And I'll be very happy to answer them.

15 A. Yes, thank you.

16 Q. You understand that you're under oath?

17 A. Yes, I do.

18 Q. Do you understand that you're under oath as you
19 would be in a court of law?

20 A. Yes, I do.

21 Q. To facilitate things and to make your
22 attorney's job and my job a little easier, I'm also going
23 to ask you to please wait for the end of my questions
24 before you provide an answer so that our voices are not
25 on top of each other in the transcript. Would you agree

1 the changes for NewCo at that particular time, agree to 2 them, yes, they should be reflected in that plan, but the 3 key to that statement was if he agreed to it and if he 4 was willing to go forward with that type of negotiation 5 and include it in that business plan at that particular 6 time. 7 Q. Well, let's go back, then, to your recollection 8 of the last iteration of the business plan of NewCo that 9 you saw before you left MesoSystems or before your last 10 day at MesoSystems. 11 Would that business plan, then, be different 12 from the business activities that you had envisioned for 13 Red Path Energy, Inc.? 14 A. It's a good chance that you can go further 15 enough back in time where the business plans possibly 16 would have some similarities, because the negotiations 17 were not complete. 18 Q. I wasn't talking about going back in time. I 19 was talking about the last iteration that you saw. 20 A. You referred to the last iteration that I saw. 21 and my belief is that that last iteration is, quote, 22 unquote, "back in time," and it's a good chance that, you 23 know, there were some similarities between the business 24 plans of Red Path Energy, which I don't even know existed 25 at this date, and NewCo's business plan.	85 1 A. That was never my understanding. 2 Q. How about with NewCo? 3 A. Never my understanding, nor with Honda, nor 4 with any other entity that I had involvement with. 5 Q. Was there any intellectual property that had 6 been put in place which would be placed into Red Path 7 Energy, Inc., at the time that it was incorporated? 8 MR. ARTUSO: I'm going to object on the basis 9 that "intellectual property" is pretty broad and vague. 10 Are you talking about issued patents, or are you talking 11 about trade secrets? Are you talking about just ideas? 12 MR. LEON: I'll define it as disclosures, trade 13 secrets, patent applications or patents issued, and 14 trademarks. 15 A. And trademarks. 16 Help me out, Dr. Leon. I'm going to try and 17 repeat it so I can process it again, your question. 18 Q. Disclosures -- 19 A. Just the full question. I'm sorry. 20 Q. Whether, at the time that you were involved in 21 incorporating Red Path Energy, Inc., there were any items 22 of intellectual property, as you've just defined, that 23 were going to be placed with Red Path Energy, Inc. or 24 made part of Red Path Energy, Inc. 25 A. The last time I recalled, there was a clear	87
1 Q. When was the last time that you saw a business 2 plan for NewCo? 3 A. Maybe back in October I saw a draft. 4 Q. Early October? Mid-October? Late October? 5 A. My guess is maybe early October or mid-October, 6 sometime -- maybe mid-October, because my function with 7 respect to that business plan was just to gather data and 8 information, not to review the entire document as an 9 entity. 10 Q. Who is listed as directors of Red Path Energy, 11 Inc., in the document that you have in your hands? 12 A. Is it the same page that that information would 13 be on? 14 Q. The next page. 15 A. Thank you. 16 Q. Or maybe even the page after that. 17 A. Thank you. 18 James Seaba and Cory Phillips. 19 Q. Was your understanding -- 20 A. Article VII, right? 21 Q. Yes. 22 A. That's correct. Thank you. 23 Q. Was your understanding at the time that Red 24 Path Energy, Inc., was incorporated that it would compete 25 in any way with MesoSystems Technology?	86 1 effort on the part of all entities involved in setting up 2 Red Path that intellectual property would be separate to 3 each corporate entity and not talk to each other. 4 Q. But do you remember any specific item of 5 intellectual property that was being allocated into Red 6 Path Energy, Inc., at that time? 7 A. Dr. Leon, allocated from whom and -- just from 8 whom? 9 Q. Well, we'll get to that. I mean, if there is 10 anything that is going to be placed in it, then the 11 follow-up question would be to try to find out what it is 12 and where it came from. 13 A. Yeah, nobody was placing intellectual property 14 from anywhere into Red Path. 15 Q. Do you remember where you were on Tuesday, 16 December 4th, 2001? This was two days before your last 17 day at MesoSystems. 18 A. I remember, about that week, that I was -- what 19 I do remember about that week is that I was trying to 20 spend a lot of time researching information for 21 establishing, possibly, some proposals to certain 22 different -- different government agencies, like types of 23 proposals for, maybe, SBIRs or other types of proposals 24 that we could use to generate money for Red Path, so -- 25 I do recall, from a meeting that I had with	88

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1 expect and would appreciate the same from you. So
2 refrain from boisterous behavior, please.

3 A. You are being respectful, Dr. Leon, and I
4 apologize for raising my voice to you. I apologize to
5 the Court as well. I'm a little sorry, just hurt, that
6 he terminated me unlawfully over the phone and could not
7 do it face-to-face.

8 MR. ARTUSO: Why don't we take a quick break.
9 (Recess taken.)

10 Q. If we look at Exhibit 17, can you tell me why
11 the needle valve SS-SS2 was in your possession –

12 A. Yes.

13 Q. – upon your departure from MesoSystems?

14 A. Yes. That needle valve, most likely, was in
15 some personal materials that I had taken from
16 MesoSystems.

17 Q. Can you tell me what that needle valve is used
18 for in your research work or what it would be used for in
19 MesoSystems' work?

20 A. Many different capacities. It's a valve, so if
21 you have gas flowing and you need to stop the flow of
22 that gas, this would be possibly one use for that valve.

23 It's a needle valve, so it can also control the
24 flow of that gas. Meter the flow is the proper term.
25 maybe.

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1 Q. So I'm still a little bit confused. Under what
2 set of circumstances would a piece of equipment like that
3 be taken out of the premises and taken to somebody's
4 house?

5 A. My theory is I probably ordered this needle
6 valve and it got mixed in with some personal items that I
7 had and that's why it was in my possession, because
8 you're –

9 Q. Go ahead.

10 A. – because you're not asking why the cell phone
11 is in my possession, either. That was a personal item.

12 Q. No, I'm talking about the needle valve.

13 A. So it's the same as the cell phone. It was a
14 personal item that was probably removed from MesoSystems.

15 Q. How would an F series filter – why would that
16 be in your possession?

17 A. The same reason as the needle valve, as I
18 mentioned earlier.

19 Q. How big of an item is this filter?

20 A. Small. They're maybe half the size of my hand.
21 You could drop those in a box or something and not even
22 know you have them in the box.

23 Q. The same for a needle valve?

24 A. Oh, yeah.

25 Q. Small item?

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1 A. Definitely.

2 Q. How about the TF series filters?

3 A. The same reason as the needle valve.

4 Q. How big of an item is that?

5 A. To the best of my memory, I think it's on the
6 order, in terms of size, of the needle valve or other
7 filter that you requested information about.

8 Q. There is an item here, a UT by one-half
9 Swagelok? I don't – I can't read the handwriting there
10 on Exhibit 17.

11 A. Yeah, that's the – yeah, the half-inch
12 Swagelok?

13 Q. Yes.

14 A. What's interesting is I don't know what they
15 mean by UT, but I must have interpreted it correctly when
16 I returned the items. Whatever that small fitting is –

17 Q. Is that what it is, a fitting?

18 A. Yes. It's a tube fitting, yes.

19 Q. How about the storage cylinder, ABQ 01-094?
20 How would that end up in your possession?

21 A. The same way.

22 Q. You testified earlier that, as far as the
23 substrates, none of them had been sent out after you left
24 – well, actually, either before or after you left or the
25 last day of your employment at MesoSystems. Is that

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1 correct?

2 A. Yes.

3 Q. Now, would it surprise you to know that there
4 were two substrates in the possession of TSP that TSP
5 delivered to – or that, actually, MesoSystems picked up
6 at TSP in addition to the ones listed on Exhibit 17?

7 A. No, there was one substrate that possibly went
8 to TSP, if I recall.

9 Q. One substrate? One or two?

10 A. Well, it wasn't that many. It was one, maybe,
11 that went over to TSP. Thank you for reminding me.

12 Q. Let's talk about TSP, then.

13 A. Okay.

14 Q. Who are they?

15 A. I believe TSP stands for Team Specialty
16 Products, and they're a local prototyping business in
17 town.

18 Q. Did you have any contacts or – yeah, any
19 contacts with anyone at TSP after your last day at
20 MesoSystems?

21 A. After my last day at MesoSystems?

22 Q. Yes.

23 A. Sure.

24 Q. Can you tell me about those contacts and the
25 context of them and so forth?

	121		123
1	A. I talked to several people at TSP after my	1	A. That one stands out in my mind, but I'm sure
2	employment with MesoSystems, for instance, Bob Sachs, Dan	2	maybe other hydrocarbons could be used, but that one --
3	Sachs, Dan O'Geary, Paul Reynolds. That's -- I can't	3	the discussions regarding that particular hydrocarbon
4	think of any more outside of them.	4	stand out in my mind.
5	Q. Were there any discussions about TSP maybe	5	Q. I'm trying to ascertain whether there was any
6	becoming an investor in Red Path Energy after your	6	other hydrocarbon-related work that you did during your
7	departure from MesoSystems?	7	time at MesoSystems or that you were involved in in any
8	A. Yes. Possibly, yes.	8	way.
9	Q. And at the same time they were holding	9	A. No, not at -- other than that, I can't think of
10	MesoSystems' samples while you were talking about them	10	anything else.
11	being an investor for Red Path Energy?	11	Q. As far as this particular propane project that
12	A. I'm not getting the connection in your	12	you mentioned, was there any, again, intellectual
13	question, actually.	13	property created or derived from it? And we'll use the
14	Q. Well, there's no connection. There is just a	14	same definition that we used before.
15	time.	15	A. The same definition, yes, that we used before.
16	At the same time that they were holding these	16	I'm sorry for talking over you.
17	samples or these substrates that had been sent to them,	17	There was work product developed as a result of
18	you were engaged in discussions with them about funding	18	that activity. The work product was in the form of a 3-D
19	for Red Path Energy?	19	rendering, drawings that had been provided by TSP under a
20	A. It's possible that there's some overlap there.	20	work-for-hire situation.
21	Yes, it's possible.	21	Under that work-for-hire activity, they
22	Q. Do you know if the samples that went to TSP	22	generated a presentation for that device that involved
23	were sent to them before your last day at MesoSystems or	23	the hydrocarbons, and that presentation was done out of
24	after?	24	an obligation for a meeting where a representative from
25	A. I believe, before I was terminated at	25	DOD would be there at that meeting and they wanted to
	122		124
1	MesoSystems.	1	have some type of deliverable.
2	Q. And you sent those? You would be the one that	2	It turns out, they never showed that
3	would have sent those to them?	3	deliverable to the DOD representative, which I found very
4	A. Most likely, it was me that sent them over,	4	interesting, but --
5	yes.	5	Q. What is your understanding, then, as to who
6	Q. Did any of the work that you did during your	6	that intellectual property belonged to?
7	tenure at MesoSystems -- and that includes government	7	MR. ARTUSO: Objection to the extent you're
8	contract work, the DOD project, Palm Power or whatever.	8	asking for a legal conclusion.
9	A. Okay.	9	MR. LEON: I'm just asking to the extent that
10	Q. Did any of that work involve hydrocarbons?	10	he understands intellectual property to be defined under
11	A. Yes, and when you say "involve," you don't mean	11	the parameters that we did before.
12	from an experimental standpoint, but from a planning	12	Q. Who owned that?
13	perspective or design perspective, I gather?	13	A. Oh, MesoSystems owned that.
14	Q. Well, tell me. Why don't you tell me which	14	Q. And none of that intellectual property or data
15	hydrocarbons were involved and in what context they were	15	or whatever ended up in Red Path Energy's business plan
16	involved.	16	after December 6, 2001?
17	A. It's important to understand that there was no	17	A. I'm not totally sure if it did or not. My
18	experimental infrastructure in place at the time that I	18	belief is that it didn't, but I'm not totally sure.
19	was at MesoSystems, so the hydrocarbon discussions	19	Q. So let me just ask, for my own edification and
20	occurred with respect to designs, and one design that	20	clarification, both Dr. Seaba and yourself have referred,
21	stands out in particular is the start-up reactor that	21	up to this point, to the NewCo business plan as being
22	Dr. Seaba mentioned yesterday, and that start-up reactor	22	based on ammonia or sole sodium ammonia, and now we're
23	would involve propane, possibly, as a fuel, and propane	23	talking about some hydrocarbon-related work, so clarify
24	is a hydrocarbon.	24	that for me, please.
25	Q. Any other hydrocarbons involved?	25	A. The hydrocarbon part of that work was simply

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1 Q. Do you know if that payment covered the 14 days
 2 after December 6th?

3 A. I'm not sure. I'm not sure. I'm sorry.

4 Q. Do you have a pay stub or records that we could
 5 take a look at?

6 A. I'm sure. I'm sure we could produce that. I'm
 7 sure.

8 Q. In the second part of the message, can you read
 9 -- on this part. I'm going to ask you to read out loud
 10 for me.

11 A. Okay.

12 Q. Starting with "Hello Cory" and so forth.

13 A. Okay. "Hello Cory. One, one more message. If
 14 de -- Please do not delete files from your hard drive or
 15 from your mail system. Everything on the computer is
 16 company property. Its company files and deleting them is
 17 effectively just destroying company property and I don't
 18 think you want to go down that path. Please bring
 19 everything in 'as is' and, hopefully, we'll see you by 3.
 20 Take Care."

21 Q. Did you follow these instructions that were
 22 given to you by Dr. Cali?

23 MR. ARTUSO: Objection, compound. Which
 24 instructions?

25 MR. LEON: "Do not delete files from your hard

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1 helping prepare a business plan.

2 Q. Did that take place? Did you have TVC help you
 3 prepare a business plan?

4 A. TVC helped educate us on certain aspects of a
 5 business plan. Whether that plan was finished. I -- I
 6 don't think so. I don't think it was a completed
 7 document, if you will.

8 Q. Were you involved in the preparation of this
 9 partial business plan or this incomplete business plan?

10 A. Yes, yes, more of a supportive role, and Dr.
 11 Seaba typically led the authorship of a business plan, so
 12 I was mostly supporting him in that activity.

13 Q. Are you aware as to whether this business plan
 14 was sent to anybody?

15 A. No, I'm not aware. We never re- -- we never
 16 completed our relationship with TVC.

17 Q. Any other activities toward obtaining funding
 18 that you participated in, too?

19 A. Not that stand out in my mind.

20 Q. How about conversations with TSP about
 21 potentially funding Red Path Energy, Inc.?

22 A. Yeah, that is a form of investment.

23 Yes, conversations with TSP, that's correct. I
 24 was mostly talking about venture capitalist kind of
 25 investment. Yes, in-kind investment, like TSP

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1 drive or from your mail system."

2 A. Yes.

3 Q. So what did you do with the computer after
 4 receiving this message?

5 A. Stopped using it. It's a termination, so I
 6 stopped using the computer. It's time to stop using it.

7 Q. Let's move on. I'm going to ask you a few
 8 questions about activities undertaken by Red Path Energy,
 9 Inc., after December 6th, 2001.

10 A. Sure.

11 Q. Can you tell me, you know, in as concise a
 12 manner as you can possibly do so, what plans were
 13 formulated for Red Path Energy, Inc., after December 6th,
 14 2001?

15 A. Plans in the form of -- could you help me out,
 16 please?

17 Q. What were your ideas as to what you were going
 18 to do through Red Path Energy, Inc., after that date?

19 A. The first plan I remember was just to try to
 20 get funding somehow. It's the only plan that comes to
 21 mind.

22 Q. Did you undertake any activities to further
 23 this funding, you know, to obtain funding?

24 A. Yes. The only activity that comes to mind is
 25 the involvement of TVC, Technology Ventures Corporation.

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1 discussions were, I was involved in those discussions

2 Q. Did anything come out of that?

3 A. No.

4 Q. Do you remember when these discussions took
 5 place?

6 A. Maybe sometime in January.

7 Q. Who did you talk to at TSP?

8 A. There were conversations with -- that involved
 9 Dr. Seaba, myself and, typically, maybe Bob Sachs or Dan
 10 Sachs.

11 Q. How did you first get acquainted with TSP?

12 A. Sometime in the fall -- and I was still with
 13 MesoSystems -- we asked them to do some fabrication work,
 14 work-for-hire type of activities.

15 Q. So you were aware that MesoSystems was working
 16 in some capacity with TSP before December 6th, 2001?

17 A. No, I was not aware of that. In fact, I
 18 received lots of resistance -- I was responsible for
 19 bringing TSP to MesoSystems, and I received lots of
 20 resistance from several people in MesoSystems at the --
 21 in terms of my memory now, Dr. Call and, actually, Dr.
 22 Chellappa posed some resistance to that relationship,

23 because they felt like they had their own machine shop in
 24 Kennewick, Washington, that could accomplish the job that
 25 they needed, and, in reality, TSP had probably the

Ned Godshall
4/1/2003

Seaba vs. Mesosystems

Page 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
No. Civ. No. 00-103 LM (WWD)
JAMES SFABA and COPY PHILMERS,
Plaintiffs,
vs.
MEBO SYSTEMS TECHNOLOGY, INC.,
Defendant.

2020 RELEASE UNDER E.O. 14176 2020 RELEASE UNDER E.O. 14176

April 1, 1963

500 Main Street, N.W.
Albuquerque, New Mexico

PURSUANT TO THE APPROPRIATE RULES OF THIS
PROCEDURE this deposition was:

TAKEN BY: LISA MAHN
Attorney for Plaintiff

For the first time, the U.S. has a clear-cut, well-defined, and well-supported policy.

MODFARIN, SHEPPARD, ROBERTS, LARSON & SISK, P.L.L.C.
500 Fourth Street, N.W.
Suite 1700
Albuquerque, New Mexico 87101

BY: MS. LISA MANN

1113 - ANGELA A.B.

III. ANALYSIS AND DISCUSSION

Defendant:

BACMAN, DOW, MCINTOSH & TIGHE

EDUCATIONAL TESTS

197305 Indian School Road N.E.

Albuquerque, New Mexico

WYOMING STATE BOARD OF EDUCATION

CHRISTOPHER BATTAGLIA

MS. REPERTORY: JAMES GIBBON and JOHN BELL 123

Ned Godshall
4/1/2003Seaba vs.
Mesosystems

<p style="text-align: right;">Page 6</p> <p>1 Q. What case was that? 2 A. It was a case having to do with me here locally 3 in a lawsuit in Albuquerque. 4 Q. What was the nature of the lawsuit? 5 A. Can you -- 6 Q. What kind of lawsuit was it? What was the claim 7 against you? 8 A. There wasn't one. 9 Q. Were you bringing a claim? 10 A. Yes. 11 Q. What claim were you bringing? 12 A. Several. 13 Q. Okay. Why don't you tell me what kinds of 14 claims they were. 15 A. To the best of my recollection, because it is 16 quite involved with lots of claims, basically it had to do 17 with the way I had been treated fraudulently in a business 18 transaction. 19 Q. Who did you sue? 20 A. High Desert Investment Corporation. 21 Q. Was that a business transaction that you had 22 entered into? 23 A. Yes. 24 Q. How was the case resolved? 25 A. Can't answer the question.</p>	<p style="text-align: right;">Page 8</p> <p>1 Q. Have you ever had any other titles with 2 MesoFuel? 3 A. No 4 Q. What is your annual compensation from MesoFuel? 5 MR. LEON: Well, I am going to place an 6 objection to the extent that the question asks for any 7 kind of confidential, financial information of MesoFuels, 8 MesoSystems or of this witness as far as -- and I want to 9 take this opportunity, Ms. Mann, to bring something up to 10 you which would have an effect on today's proceedings. 11 I believe that it was in August of 2002, we 12 submitted a protective order for your consideration and we 13 have never received any input or response or anything on 14 it. So, we are going to be objecting to any financial, 15 strategic marketing, any trade secret confidential 16 information of either MesoSystems or MesoFuels across the 17 board. We would be happy to work with you guys on a 18 protective order so that information can be disclosed at a 19 later time. As of today, we are going to object to that. 20 MS. MANN: I don't think that is going to work 21 so, we can, however, agree that we will pursue diligently 22 an effort to get a protective order entered that we 23 mutually agree on and that when we enter a protective 24 order this deposition would be subject to it, but I would 25 resist any effort to force us to redepose this witness on</p>
<p style="text-align: right;">Page 7</p> <p>1 Q. You don't know how it was resolved? Did the 2 case ever end? 3 A. The case hasn't ended so there is no answer to 4 your question. 5 Q. The case is still pending? 6 A. That is correct. 7 Q. Who is representing you in that case? 8 A. In that case, Bauman, Dow & McIntosh. 9 Q. Why don't you tell me generally your educational 10 background. 11 A. Most recently I have a Ph.D. in material science 12 from Stanford University and an MBA from the Anderson 13 School of Management at University of New Mexico. 14 Q. When did you obtain your MBA? 15 A. 1994. 16 Q. When did you obtain your Ph.D.? 17 A. 1980. 18 Q. Who is your present employer? 19 A. MesoFuel Inc. 20 Q. Since when have you been employed by MesoFuel? 21 A. January 1, 2002. 22 Q. What is your present title? 23 A. President and CEO. 24 Q. CEO? 25 A. Yes.</p>	<p style="text-align: right;">Page 9</p> <p>1 things that could be subject to a protective order when we 2 can resolve that easily by proceeding and agree that the 3 entire deposition will be kept confidential until such 4 time as we enter into a protective order. That should 5 protect any concerns you have about confidentiality. 6 MR. BAUMAN: That is fine. 7 MR. LEON: Okay. 8 Q. (By Ms. Mann) Can you go ahead and answer the 9 question? 10 A. \$150,000 a year. 11 Q. Does that \$150,000 a year include any kind of 12 bonus package arrangement? 13 A. Can you elaborate? 14 Q. Do you have a bonus -- an agreement for bonus 15 compensation that is in addition to the \$150,000 a year? 16 A. No. 17 Q. There is no understanding with MesoFuel about a 18 bonus or possible bonuses that you might receive? 19 A. I believe I just answered that. 20 Q. Okay. Are there other benefits that you receive 21 as president and CEO of MesoFuels that are not included 22 within the \$150,000 a year? And by that I mean, benefits 23 like stock options, profit sharing, retirement, that kind 24 of thing? 25 A. Yes</p>

3 (Pages 6 to 9)

MESOSYSTEMS TECHNOLOGY, INC.'S PRIVILEGE LOG

<u>Date</u>	<u>Author</u>	<u>Recipient</u>	<u>Description of Document</u>	<u>Status</u>	<u>Applicable Privilege</u>
08/05/01	Dick Rohde	Jeff Lubbeck Chuck Call	Email attaching revised draft of Seaba Offer Letter	Not Provided	Attorney-Client
07/26/01	Jeff Lubbeck	Dick Rohde	E-mail regarding draft of Seaba Offer Letter	Not Provided	Attorney-Client
03/07/02	Kirk Soderquist	Paul Smith	E-mail forwarding e-mail dated 8/29/01 from Jeff Lubbeck to Kirk Soderquist regarding incorporation of subsidiary	Not Provided	Attorney-Client
03/07/02	Kirk Soderquist	Paul Smith	E-mail forwarding e-mail dated 10/02/01 from Kirk Soderquist to Jeff Lubbeck, Chuck Call & Mike Martin regarding MesolFuel formation	Not Provided	Attorney-Client
03/07/02	Kirk Soderquist	Paul Smith	E-mail forwarding e-mail dated 10/08/01 from Jeff Lubbeck to Kirk Soderquist, Chuck Call & Mike Martin regarding incorporation of MesolFuel	Not Provided	Attorney-Client



03/07/02	Kirk Soderquist	Paul Smith	E-mail forwarding e-mail dated 10/08/01 from Jeff Lubeck to Kirk Soderquist regarding Mesofuel board	Not Provided	Attorney-Client
03/07/02	Kirk Soderquist	Paul Smith	E-mail forwarding e-mail dated 10/19/01 from Jan Marsieck to Kirk Soderquist regarding Mesofuel formation documents	Not Provided	Attorney-Client
03/07/02	Kirk Soderquist	Paul Smith	E-mail forwarding e-mail dated 10/31/01 from Jeff Lubeck to Kirk Soderquist & Jan Marsieck regarding Mesofuel shareholder meeting	Not Provided	Attorney-Client
03/07/02	Kirk Soderquist	Paul Smith	E-mail forwarding e-mail dated 11/07/01 from Kirk Soderquist to Jeff Lubeck & Jan Marsieck regarding incorporation of Mesofuel	Not Provided	Attorney-Client
03/07/02	Kirk Soderquist	Paul Smith	E-mail forwarding e-mail dated 11/07/01 from Jeff Lubeck to Kirk Soderquist & Jan Marsieck regarding <u>Mesofuel incorporation</u>	Not Provided	Attorney-Client

03/07/02	Kirk Soderquist	Paul Smith	E-mail forwarding e-mail dated 12/06/01 from Charles Call to Kirk Soderquist, Jeff Lubbeck & Dick Rohde regarding draft agreement with James Seaba;	Not Provided	Attorney-Client
03/07/02	Kirk Soderquist	Paul Smith	E-mail forwarding e-mail dated 12/06/01 from Charles Call to Dick Rohde & Kirk Soderquist regarding letter to James Seaba and Cory Phillips	Not Provided	Attorney-Client
03/07/02	Kirk Soderquist	Paul Smith	E-mail forwarding e-mail from Samantha League to Kirk Soderquist regarding James Seaba's termination letter	Not Provided	Attorney-Client
03/07/02	Kirk Soderquist	Paul Smith	E-mail forwarding e-mail dated 12/18/01 from Jeff Lubbeck to Jan Marsieck, Kirk Soderquist & Matt Wagner regarding incorporation of Mesofuel	Not Provided	Attorney-Client
03/07/02	Kirk Soderquist	Paul Smith	E-mail forwarding e-mail dated 11/28/01 from Charles Call to Kirk Soderquist	Redacted	Attorney-client

08/02/01	Samantha League/Charles Call	Richard Rolde	Draft of Offer of Employment with MesoSystems Technology, Inc. for James Scaba	Not provided	Attorney-client Work product
05/21/02	Lisa Albrecht	Paul Smith	Faxsimile forwarding report from Robert W. Ilamie Jr. of The Ilamie Group, L.L.C.	Not provided	Attorney-client Work product

1
2 IN THE UNITED STATES DISTRICT COURT
3
4 FOR THE DISTRICT OF NEW MEXICO

5 JAMES SEABA and CORY PHILLIPS,)
6 Plaintiffs,) Civ: No.
7 vs.) 02-103-LH/WWD
8 MESOSYSTEMS TECHNOLOGY, INC.,)
9 Defendant.)
10
11

COPY

12 DEPOSITION OF SAMATHA LEAGUE

13 Taken at the instance of the Plaintiffs

14
15 May 16, 2003
16
17 1:30 p.m.
18
19 415 N. Quay
20
21 Kennewick, Washington

22
23 BRIDGES & ASSOCIATES
24 Certified Shorthand Reporters
25 P. O. Box 5999
Kennewick, Washington 99336
(509) 735-2400 - (800) 358-2345



1 A. Okay. We had a single server in
2 Kennewick, Washington. We backed up data only
3 on a daily basis. And this is data that people
4 put out on the server to save. And it was, I
5 would say 99 percent of it was finance
6 documents and research and development
7 documents.

8 Q. And when was this basic back-up
9 guide developed?

10 A. We put this in place in July of
11 2002.

12 Q. Okay. And who developed this guide?

13 A. We pulled this guide off of the
14 internet. It was put in place in Albuquerque
15 first, and Phil Ferguson provided me this copy
16 as a guideline for putting things in place here
17 in Kennewick, Washington.

18 Q. Who is Phil Ferguson?

19 A. Phil Ferguson is an IT person for
20 Meso Fuel.

21 Q. And why was it decided that you
22 should implement this procedure in, you say,
23 July of 2002?

24 A. Yes, sir. It is an improvement on
25 our existing system. We upgraded our own

1 server here in terms of memory, and we needed a
2 better back-up system than the one we had in
3 place.

4 Q. Okay. Let's talk about what you had
5 in 2001. Did you have the same server for the
6 entire year?

7 A. We had the same server in 2001.

8 Q. Okay. What was the model, the
9 manufacturer of the server?

10 A. It is a Dell server. I don't have
11 the exact model number.

12 Q. Was it a tape drive?

13 A. We do have a tape drive back-up on
14 that server, yes.

15 Q. Any other type of drive or back-up
16 system that it had?

17 A. No.

18 Q. So it's strictly a tape drive
19 server?

20 A. Yes.

21 Q. Where is the Dell server now? You
22 said it has been upgraded or replaced.

23 A. We upgraded the hard drives on that
24 server, and it is currently sitting in our
25 server room here at 415 North Quay Street.

1 Q. Is there now a server in place in
2 Albuquerque?

3 A. Yes, there is.

4 Q. When was that server brought on
5 line?

6 A. In the spring, I would say May, June
7 time frame of 2002.

8 Q. Prior to that time all of the
9 Albuquerque data had to be backed up on the
10 Kennewick server, is that correct?

11 A. That's incorrect.

12 Q. Okay. Correct me.

13 A. Albuquerque computers, the people
14 who worked on their computers, they were not on
15 MesoSystems' network. They were responsible
16 for backing up their own data.

17 Q. How would they do that?

18 A. They could do that with CD rewrite
19 drives.

20 Q. Was there a separate drive for each
21 work station or was there a central CD drive
22 that you saved it to?

23 A. There was an external CD rewrite
24 that was in Albuquerque. It was in the office
25 also there, accessible to anyone who needed to

1 take those individual back-ups and place it on
2 a network server?

3 A. Not to my knowledge. Not by me.

4 Q. So the data, as far as you know, the
5 data on the Albuquerque server is going forward
6 from July 2002 only, it doesn't have any
7 historic or archived data?

8 A. I don't know of any archived data
9 that's been put on it.

10 Q. And each individual would have
11 whatever CD's they managed to copy during the
12 time prior to the server being put in service
13 in Albuquerque?

14 A. Yes.

15 Q. What operating system software was
16 used?

17 A. For most of our computers that they
18 were operating they used Windows 2000 as their
19 operating system. We had a few computers that
20 were running Windows ME. And we had at least
21 one computer that was running Windows 98.

22 Q. How was it determined which computer
23 would be using which operating system?

24 A. It depended on what the computer
25 came with, for the most part.

1 any printers or any information on the server.

2 Q. Now, what's the server doing? I
3 come in with my laptop and I plug into the
4 wall, I put in my password, I am now on the
5 network.

6 A. Uh-huh.

7 Q. What is the server doing with
8 respect to the work that I do on my computer?
9 Is it automatically periodically checking to
10 see what's there and then saving it? Is it
11 just ignoring me until I take some specific
12 steps to send data to it? What is it doing?

13 A. It is not doing anything. It is
14 waiting for you to instruct it. It's basically
15 a storage server.

16 Q. Uh-huh.

17 A. It's going to sit there until you
18 send data to it.

19 Q. And how would I do that? What
20 specifically -- Let's say I'm working on a
21 document in Microsoft Word, and I get ready to
22 save the document. And I go to the save
23 command.

24 Does it ask me if I want to save it
25 to the server or save it to my local hard

1 drive, or what does it do at that point?

2 A. You are going to be asked where you
3 want to save it to. If you are on the network
4 and you are supposed to be on the network, then
5 one of the options you will have is to save it
6 to a network file.

7 Q. Okay.

8 A. But as the user, you have to
9 specify, yes, I want this to go on X file on
10 the server. Your computer is not going to do
11 that automatically. You as the user have to
12 tell it to.

13 Q. If I don't tell it to, then where
14 will it save my document to?

15 A. It will probably save your document,
16 depending on what your settings are on your
17 computer, to My Document on my desktop.

18 Q. Is there some other place that it
19 could be saved to?

20 A. If you set it to do that, yes, you
21 can set files to save just about anywhere on
22 your hard drive.

23 Q. Is there any other place at
24 MesoSystems where I could save my documents,
25 other than the server or the local hard drive?

1 A. Not that I'm aware of.

2 Q. How long would the tape drive on the
3 server be in place before it got changed out
4 for another tape drive, on average? A day? A
5 week? Do you just leave it on permanently and
6 let it get overridden?

7 A. Yeah. In 2001 we had a system where
8 we had a different tape for each day of the
9 week, Monday through Friday. Every morning I
10 would go in, if it's Monday morning, I would
11 take out the weekend tape, or the Friday tape,
12 and put in the Monday tape.

13 Q. Okay.

14 A. It is scheduled, and was scheduled,
15 to back up automatically at 10 p.m. at night to
16 that tape. And it changed, you know, for every
17 Monday I used the same tape, every Tuesday I
18 would use the same tape.

19 Q. So today is the 16th. And on Monday
20 you would put in the tape for the 16th. Are
21 you telling me that on Friday, the 23rd, would
22 you take that same tape, that May 16th tape,
23 and put it back in the server?

24 A. I'm sorry?

25 Q. Okay. Today's the 16th. Let's

1 pretend it's the 16th, sometime in 2001, and
2 it's a Friday, Friday the 16th in 2001.

3 A. Okay.

4 Q. You come in on Monday, the server at
5 10 o'clock on Friday night took all of the
6 stuff that it had and sent it to the tape.

7 Right?

8 A. Right.

9 Q. You come in on Monday and you take
10 the tape out of the server, right?

11 A. Correct.

12 Q. Do you write the 16th on there, or
13 Friday on there?

14 A. It's the Friday tape.

15 Q. Okay. Now, the 23rd comes, it's a
16 week later, it's the next Friday. Do you take
17 the tape that you had on the 16th and stick it
18 back in the server?

19 A. Yes.

20 Q. Now, when the server sends data to
21 that tape on the 23rd, does it override the
22 material that was there on the 16th, or does
23 it just put it in a new sector on the tape,
24 or --

25 A. It overrides.

1 Q. Okay. So the tape that you took out
2 on Monday is rewound all the way to the
3 beginning and then just overrides it?

4 A. Right.

5 Q. So you have no archives longer than
6 one week old in 2001, is that right?

7 A. That's correct.

8 Q. Why were you not preserving data for
9 a period longer than that?

10 A. It costs a lot for tapes. What we
11 were doing, what we wanted was if something
12 happened to the server to be able to access the
13 data basically that we had the day before.

14 You have to understand that this is
15 data that is, it's contract materials, it's
16 finance materials. It basically changes in
17 terms of finance daily. The rest of it is
18 basically hard drive -- or archived data from
19 R & D projects.

20 Q. Now, finance data is pretty
21 important, right?

22 A. Yes.

23 Q. How would you make sure you had a
24 historical record of what the finances were a
25 month ago?

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24

1 the server every day, where is it now?

2 A. That server is in this building in
3 our server room.

4 Q. Okay. And so it would still have
5 data on it from 2001?

6 A. That's correct.

7 Q. Let's talk about E-mail. I come
8 into the office, I have my laptop computer, I
9 plug into the wall, I enter my password, I am
10 working away happily during the day. And I
11 decide I'm going to send an E-mail to somebody
12 in Albuquerque, and I know they are not on the
13 network, so I am going to have to go through
14 the internet and send it.

15 Right?

16 A. That's incorrect.

17 Q. Okay. How would I send an E-mail to
18 someone in Albuquerque back in 2001 with my
19 plugged in laptop?

20 A. At MesoSystems we used the E-mail
21 Client Outlook. The Outlook settings were set
22 for an E-mail firm, I guess, they provided
23 E-mail services to us called Pacific Networks.

24 Q. Is that the name of the firm?

25 A. That is the name of the company that

1 provided our E-mail.

2 Q. Okay. And are they like an internet
3 service provider?

4 A. They are not. They are more of --
5 They provided us E-mail services. They
6 basically have a giant E-mail server of their
7 own, and we access that.

8 Q. Where are they located?

9 A. They are in Oregon.

10 Q. It's a big state. Anyplace in
11 particular?

12 A. I just know Oregon.

13 Q. Do you still use them?

14 A. No, we do not.

15 Q. When did you stop?

16 A. We stopped using them when we got
17 our exchange server, which was in May or June
18 of 2002.

19 Q. Is the exchange server then the
20 server we have been talking about?

21 A. Yes, it is.

22 Q. What kind of -- what's the -- Who is
23 the manufacturer of the exchange server?

24 A. Dell.

25 Q. And the exchange server, what is

1 A. That's for those of us who are
2 off-site, who are not at the same location as
3 the exchange server.

4 Q. Okay. Did the exchange server keep
5 a record of what it took off and where it sent
6 it and all of that?

7 A. Once I do a send and receive and I
8 pop that server and all of those E-mails come
9 to me, there is no record of it out there.

10 Q. Okay.

11 A. That is the situation that we had
12 with Pacific Networks in 2001.

13 Q. So, Pacific Networks server, what
14 you are telling me, and correct me if I am
15 wrong, is I would be at my desk with my laptop
16 plugged into the network here at MesoSystems
17 and I would prepare an E-mail and I would hit
18 send, and it would go to Pacific Networks
19 server.

20 Am I right so far?

21 A. You are right so far.

22 Q. That when the individual to whom it
23 was addressed went, booted up wherever they
24 were, and opened their inbox to get their
25 E-mail, the Pacific Networks server would send

1 their E-mail from itself to their inbox, is
2 that right?

3 A. That's correct.

4 Q. Okay. And what you are saying is
5 there is no, once it does that, Pacific
6 Networks has no record, no back-up, no archived
7 copy of that E-mail?

8 A. That's correct.

9 Q. Okay. So, the only place that those
10 E-mails would exist, then, are either on the
11 hard drive of my computer where I composed it
12 and sent it from, or on the hard drive of the
13 computer that received it, right?

14 A. That's correct.

15 Q. Or in the temp file or wherever else
16 it may end up storing that data after they
17 retrieve it, right?

18 A. Yes.

19 Q. Is there any other system that
20 MesoSystems was using in 2001 to try and back
21 up its electronic data or electronic files,
22 other than Pacific Networks server, and the
23 server that has the finance data on it?

24 A. I am not aware of any other.

25 Q. So the only other place that such

1 Responses to Plaintiff James Seaba's First
2 Request for Production to Defendant, and it
3 says, "In accordance with Rule 34 MesoSystems
4 is hereby requested to produce the following
5 documents."

6 Did you ever see any sort of
7 document like that, were you ever given any
8 document like that to try and find documents
9 that may be relevant to this case?

10 A. No. I have been asked to produce
11 documents for this case, but I haven't actually
12 seen documents like that.

13 Q. Okay. Who would ask you to produce
14 documents for the case? Counsel, or somebody
15 at MesoSystems?

16 A. MesoSystems and MesoFuels employees
17 have asked me to produce documents for this
18 case.

19 Q. Ned Godshall?

20 A. Ned Godshall, Lisa Albright.

21 Q. Anyone else?

22 A. Chuck, I believe.

23 Q. And how would you know what to look
24 for?

25 A. I looked for whatever they asked

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1 for.

2 Q. Okay. Look at this one. This one
3 says, "Please produce a copy of all documents
4 that refer to, relate to or are otherwise
5 concerned with any communication, whether
6 written or verbal, between you and Dr. James
7 James Seaba."

8 A. Okay.

9 Q. Do you remember looking for
10 documents that referred to Dr. Seaba,
11 communications with Dr. Seaba?

12 A. Yes.

13 Q. Okay. Where did you look for them?

14 A. For communications between
15 MesoSystems and Dr. Seaba, I asked folks to
16 look for E-mail and send any E-mails that they
17 had to me.

18 I compiled those. And sent them on
19 to Lisa, if I am remembering correctly.

20 Q. Did you give them any specific
21 direction as to where they were supposed to
22 look for E-mails?

23 A. In their own E-mail systems and on
24 their own computers.

25 Q. Okay. And did you give them any

1 would reside or how long it would stay on the
2 system or how it would be backed up or anything
3 like that?

4 A. No.

5 Q. When you received requests to look
6 for documents from Ned Godshall or Charles Call
7 or anyone else responsive to this case, did you
8 search the network server that has primarily
9 financial and contract data on it?

10 A. If what they asked me for pertained
11 to finance or data that I thought would be on
12 the server, then, yes, I searched those areas.

13 Q. Did you do that personally or did
14 you ask someone else to do it for you?

15 A. I would do that personally.

16 Q. Okay. And explain to me how you
17 went about your search. What is it that you
18 would ask -- or let me back up.

19 Where is it that you would ask the
20 server to look for responsive information? Was
21 it in an active file, archived files? Where
22 were you looking for stuff?

23 A. It depended on what I was asked to
24 look for.

25 Q. All right.

1 A. If I was asked for a copy of an
2 offer letter, I would go to the Human Resources
3 file and I would pull up their offer letters.

4 Q. Human Resources file would be on the
5 server?

6 A. Yes.

7 Q. Okay. Now, we looked at a request
8 for production that said all documents that
9 referred to or relate to any communication
10 between Dr. James Seaba and MesoSystems. Let's
11 look at that request by itself.

12 A. Okay.

13 Q. How would you have searched for
14 responsive documents on the server to respond
15 to that request?

16 A. I would first of all go, I would
17 pull information that has to do with their
18 hiring paperwork. Any letters that were on
19 letterhead would be kept on the server or in
20 our letter book file. I went to both of those
21 locations. Anything that was to Jim Seaba or
22 for Cory Phillips, I pulled it and had it
23 available.

24 For E-mail, I asked individuals to
25 look, and any correspondence that they had

1 individually with either of those gentlemen,
2 and asked them to send those to me. I compiled
3 them. As I recall, I sent them to Lisa in
4 Albuquerque.

5 Q. Okay. Now, if I worked in Human
6 Resources and I typed up a letter to someone,
7 let's say Dr. Seaba, and I printed it out and I
8 saved it and I decided I wanted to save it to
9 the Human Resources database file on the
10 server, with me so far?

11 A. Uh-huh.

12 Q. And then later on I decide as I am
13 working in that file, well, I don't need to
14 keep that letter anymore, can I delete it?
15 It's stored on the server. Can I delete it?

16 A. Yes.

17 Q. Okay. When I do that, it's going to
18 be sent to a deleted file, right?

19 A. Correct.

20 Q. In your search did you query the
21 deleted file for items that were responsive to
22 the request?

23 A. Not that I recall.

24 Q. Now, some programs make a temporary
25 file, and they do that automatically, right?

1 A. Yes.

2 Q. If I were in Human Resources and I
3 typed a letter to Dr. Seaba or Dr. Phillips,
4 and subsequently decided I wasn't going to send
5 it, for whatever reason, but I saved it sort of
6 in draft form, and I decided, well, I am not
7 going to send it, and then came back later and
8 decided to delete it because I wasn't going to
9 send it, is it possible that a copy of it might
10 still exist in a temporary file on the server?

11 A. I suppose it's possible.

12 Q. Okay. Now, --

13 A. I'm going to back up there.

14 Q. Okay.

15 A. I know that it's not possible,
16 because we upgraded that server in 2002, and
17 the only things that we moved over to the new
18 hard drives were intact files, like our Human
19 Resources, our finance files, our contracts
20 file.

21 So anything that would have been in
22 a temp directory would not have been
23 transferred over.

24 Q. Where are the old hard drives, the
25 ones you were using in 2001? Where are they

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1 now?

2 A. They are in our server loop.

3 Q. So it could be possible to look on
4 those old hard drives for temp directories to
5 see if there is anything that might be
6 responsive to the request there, right?

7 A. Yes.

8 Q. Okay. When you were looking for
9 responsive documents, did you do that, did you
10 go to the old 2001 hard drives and look in like
11 a temp directory to see if there might be
12 responsive materials?

13 A. No. If I could ask, when is the
14 date of those requests for? If it was before
15 we moved those files, there would have been no
16 need to go back to old hard drives.

17 Q. I can find the date. It was July or
18 August of 2002. And would that have been after
19 the new hard drives were put into the server?

20 A. July 25th, 2002, sticks out in my
21 mind as the day that we changed those hard
22 drives.

23 Q. Okay. Now, Dr. Call testified that
24 he had a laptop in 2001, and that it crashed,
25 became nonfunctional.

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2 A. The only crashed hard drive -- or
3 crashed computer that Chuck had that I'm aware
4 of happened in March or early April of 2002.

5 Q. Okay. Where is that computer now?

6 A. To my knowledge that computer is in
7 Albuquerque, New Mexico.

8 Q. Okay. And was any effort made to
9 try and recover the hard drive of that
10 computer, any of the data on that hard drive?

11 A. Absolutely. Yes.

12 Q. Okay. And who undertook that job to
13 try and recover the data on that hard drive?

14 A. I did initially.

15 Q. Okay. And what were the results?
16 What were you able to accomplish?

17 A. I was able to get part

18 from his My Documents folder. I was not able
19 to retrieve any of his Outlook file.

20 Q. Any other data or document that you
21 were able to retrieve from that hard drive?

22 A. The condition of that hard drive was
23 such, Chuck -- It would only boot up like one
24 out of ten tries. So he said if we could get
25 his My Documents files and his Outlook files,